No. 03-1162

In the Supreme Court of the United States

MICHAEL O. LEAVITT, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals held that "[t]he statutory scheme established by Congress" on the basis of which the Environmental Protection Agency (EPA) issued its Administrative Compliance Orders (ACOs) in this case "is repugnant to the Due Process Clause of the Fifth Amendment," Pet. App. 43a, and separation-of-powers principles, *id.* at 44a. Because of that constitutional holding, the court concluded that the Tennessee Valley Authority (TVA) is "free to ignore the ACO" because such orders "are legally inconsequential and do not constitute final agency action." *Id.* at 3a. The court's holding that a substantial part of the EPA enforcement scheme is unconstitutional rests on a mistaken reading of the Clean Air Act, threatens the integrity of an important component of the Act's enforcement scheme, and conflicts with a decision of this Court and decisions of two other courts of appeals. Moreover, the court's mistaken constitutional holding was compounded by its error in rejecting two threshold obstacles to this suit. Further review is warranted.[1]

[1] Respondents erroneously suggest (*e.g.*, TVA Br. in Opp. 2 n.1) that newly promulgated regulations demonstrate that TVA's conduct did not violate the Clean Air Act. Those regulations, which have been stayed

I. EPA WAS NOT THE "PREVAILING PARTY"

TVA argues that further review is unwarranted because the Eleventh Circuit dismissed TVA's petition for review and, in TVA's view, EPA therefore prevailed below. In support of that contention, TVA cites (Br. in Opp. 7) the Court's statement in *Mathias* v. *WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam), that "[a]s a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous."

Contrary to TVA's assertions, however, EPA was not a prevailing party below in any meaningful sense, and EPA is not seeking review of a "favorable judgment." The court of appeals invalidated a key aspect of EPA's enforcement authority under the Clean Air Act. That unfavorable holding is an integral and essential element of the judgment entered below.

Moreover, the statute authorizing certiorari jurisdiction in this case allows "any party" to seek certiorari and is not limited to non-prevailing parties. 28 U.S.C. 1254(1). In *Mathias*, the Court was careful to point out that the petitioners in that case were "seek[ing] review of uncongenial findings not essential to the judgment and not binding upon them in future litigation." 535 U.S. at 684.[2] When, as here, the judgment below is based on adverse holdings that *are* essential to the judgment and *are* binding in future litigation, there is no bar to this Court's grant of a petition for certiorari.

This Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), considered an analogous issue in the context of the Court's appellate jurisdiction under now-repealed provisions

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pending judicial review, have no relevance to this case, because they are exclusively prospective in effect. See Pet. 3 n.1.

[2] The Court in *Mathias* cited *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934) (per curiam). That case involved an appeal, not a petition for certiorari. Even in that context, the Court's rationale for dismissing the appeal was not unqualified. The Court noted, as it did in *Mathias*, that the unfavorable aspects of the judgment sought to be appealed "are not to be regarded as *res judicata*" in future proceedings. *Ibid.*

of 28 U.S.C. 1252 (1982).[3] In that case, certain parties filed a motion to dismiss the government's appeal on the ground that the INS was not an "aggrieved party" because the INS had "sought the invalidation of [the statute at issue] and the Court of Appeals granted that relief." 462 U.S. at 930. The Court refused to dismiss the appeal, holding that "[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal." *Id.* at 931. That principle applies *a fortiori* to cases involving certiorari. Indeed, in the context of certiorari *before* judgment, the Court has repeatedly construed Section 1254(1) to authorize review even at the request of a party who has prevailed. See *United States* v. *Nixon*, 418 U.S. 683, 686 & n.1 (1974) (citing cases).

Under those principles, EPA is an aggrieved party entitled to petition for certiorari in this case. The court of appeals held that, although the Clean Air Act authorizes penalties for violation of ACOs, that portion of the Act is unconstitutional. That holding was essential to—indeed, it provided the sole basis for—the court's dismissal of TVA's petition for review, and it effectively precludes EPA from obtaining civil penalties for violations of Clean Air Act ACOs in the Eleventh Circuit. Accordingly, there is no bar to granting EPA's petition for certiorari in this case.

II. THE COURT OF APPEALS HELD AN ACT OF CONGRESS UNCONSTITUTIONAL BASED ON A MISINTERPRETATION OF THE CLEAN AIR ACT

The court of appeals' constitutional decision was based on its conclusion that "[t]he problem with ACOs stems from their injunction-like legal status coupled with the fact that

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[3] Cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 70 n.5 (1977) (noting that grant of certiorari petition at request of prevailing party "may * * * appear anomalous" but concluding that issue need not be addressed because of ruling vacating judgment below on certiorari petition filed by losing party).

they are issued without an adjudication or meaningful judicial review." Pet. App. 6a-7a. As explained in the petition (at 13-15), the merits of an EPA ACO under the Clean Air Act are *always* subject to meaningful judicial review. The court of appeals erred in finding a preclusion of judicial review in the Clean Air Act, especially in light of the need for courts to attempt to preserve—not impugn—the constitutionality of statutes.

A. TVA does not defend the court of appeals' conclusion that meaningful judicial review of EPA orders is unavailable. Instead, TVA argues (Br. in Opp. 23) that "[t]he Eleventh Circuit's due process ruling is not premised on the absence of judicial review," but rather on "the absence of any statutory procedures for adjudication before a final ACO that creates liability for past conduct is issued." TVA is mistaken.

The court of appeals never suggested that the absence of statutorily mandated agency procedures alone would have been sufficient to support its holding of unconstitutionality. To the contrary, the court repeatedly emphasized that the lack of opportunity for effective judicial review of EPA orders under the Clean Air Act was essential to its holding. The court stated that the problem was that orders are "issued without adjudication *or* meaningful judicial review," Pet. App. 6a; that, in a judicial proceeding, the recipient of an order "does not have a chance to contend that the EPA has an incorrect view of the facts and law," *id.* at 11a; that the recipients of the order therefore "never get an opportunity to argue, before a neutral tribunal, that [there has been no violation]," *ibid.*; and that "[t]he only real inquiry" in a judicial action regarding an EPA order "is whether the Administrator possessed 'any information'—a standard that is less rigorous than the 'probable cause' standard found in the criminal law setting," *id.* at 30a. In the court's view, "[w]hether the Administrator's facts are too thin to warrant an adjudicated finding" of a violation "is irrelevant as far as ACOs are concerned." *Ibid.*

The court of appeals relied on those descriptions of the Act's supposed preclusion of effective judicial review to reach its ultimate conclusion that the Act is unconstitutional. As TVA states (Br. in Opp. 25), the court also referred to the requirement of "a full and fair hearing before an impartial tribunal." Pet. App. 43a. But the court found that the opportunity for such a hearing was lacking because of its mistaken view that no judicial tribunal could meaningfully review the substance of an EPA order under the Clean Air Act. Moreover, the court's alternative separation-of-powers holding was equally clearly based on its conclusion that "*[w]ithout meaningful judicial review*, the scheme works an unconstitutional delegation of judicial power." *Id.* at 45a (emphasis added). See also *ibid.* (courts may review only "whether the Administrator based her decision to issue the ACO based upon 'any information' as opposed to no information at all.'"). The court of appeals' constitutional holdings thus rest on its conclusion—not defended by TVA—that the Act does not permit meaningful judicial review of Clean Air Act orders.

Perhaps TVA means to argue that the lack of mandatory statutory procedures for the issuance of Clean Air Act orders is sufficient to establish a violation of the Due Process Clause, even if meaningful judicial review is available. The Act itself, however, expressly grants the recipient of an order "an opportunity to confer with the Administrator concerning the alleged violation" before an order may take effect, 42 U.S.C. 7413(a)(4); the agency may adopt such further procedures as are appropriate (especially to save the Act from unconstitutionality, see Pet. 15 n.5); and the availability of meaningful (and appropriately tailored) judicial review would be sufficient to ensure due process for the recipient in any event. In this case, in particular, TVA's complaints about the lack of a statutorily mandated procedure could not be sufficient to support the court of appeals' holding, both because TVA in fact had the benefit of a full agency adjudication, with substantial procedural protections and hearings,

and because TVA is not a "person" protected by the Due Process Clause. See Pet. 4-5, 15 n.5. In any event, the court of appeals did not rest its decision on the principle now advocated by TVA. Further review is warranted to address the court of appeals' conclusion—apparently not supported by any party to this case—that the Clean Air Act's scheme for enforcement of administrative orders is unconstitutional because it precludes effective judicial review of those orders.

B. TVA correctly points out (Pet. 18-19) that, under 42 U.S.C. 7607(a) and (b), if an EPA order is subject to judicial review in a pre-enforcement action, it is not subject to such review again in an enforcement action. See Pet. 15 n.4. TVA argues that the government has taken the position that a Clean Air Act order is subject to review in an enforcement action, and that it follows necessarily that the order in this case is not subject to review in this pre-enforcement action.

TVA misreads the government's position. The government's position is that all Clean Air Act orders, including the one in this case, are subject to meaningful judicial review at some stage before noncompliance penalties can be imposed. Insofar as a Clean Air Act order is final, the court may fully review its validity at the pre-enforcement stage. Indeed, in direct conflict with the court of appeals' holding in this case, the Supreme Court conducted exactly that sort of careful judicial review in *Alaska Department of Environmental Conservation* v. *EPA*, 124 S. Ct. 983 (2004). See Pet. 16-17.[4] Insofar as an order is otherwise not final, it is subject to review in a subsequent civil enforcement action. See, *e.g.*,

[4] As explained in the petition (at 17-19), the decision in this case also conflicts with *Allsteel, Inc.* v. *EPA*, 25 F.3d 312 (6th Cir. 1994), and *Alaska Department of Environmental Conservation* v. *EPA*, 244 F.3d 748 (9th Cir. 2001), aff'd, 124 S. Ct. 983 (2004), each of which held that the EPA order at issue was final and subject to review. TVA argues (Br. in Opp. 22) that the conflict is not real, because those courts "fail[ed] to grapple with the constitutional problems" perceived by the court of appeals in this case. They did not do so, however, because they did not agree with the implausible conclusion that the Clean Air Act precludes effective judicial review of EPA orders.

Solar Turbines, Inc. v. *Seif*, 879 F.2d 1073, 1078 (3d Cir. 1989). Cf. Pet. 14 n.3 (noting that 42 U.S.C. 7413(e)(1) provides that the district court "shall" before imposing penalties consider "such * * * factors as justice may require"). In either event, the court of appeals erred in concluding that an EPA order under the Clean Air Act is not subject to meaningful judicial review. The fact that in some cases that review occurs at the pre-enforcement stage and in other cases only in an EPA enforcement action is of no consequence for the instant dispute.

C. TVA argues (Br. in Opp. 20) that the court of appeals' decision leaves "EPA's enforcement powers * * * intact," because EPA retains other enforcement mechanisms. Even the court of appeals, however, recognized the "unavoidable conclusion that Congress did, in fact, authorize the issuance of ACOs with the status of law." Pet. App. 4a. Congress thus viewed the issuance of compliance orders enforceable by civil penalties—not merely the ability of EPA "to serve notice of EPA's position in order to obtain voluntary compliance with the law," TVA Br. in Opp. 21—as essential for EPA's functions. As the petition notes (Pet. 18), EPA issues administrative orders under various environmental statutes more than a thousand times each year. Without the threat of potential noncompliance penalties for orders under the Clean Air Act (and perhaps other statutes), the utility of this enforcement mechanism would be dramatically reduced or eliminated. The court of appeals' holding that, despite Congress's clear intent, order recipients are "free to ignore" ACOs (Pet. App. 3a) warrants further review.

III. THE THRESHOLD ISSUES ALSO MERIT REVIEW

Further review is also warranted of the two threshold issues resolved by the court of appeals: whether this dispute between TVA and EPA presents an Article III case or controversy, see Pet. 18-23, and whether TVA had independent litigating authority to file the petition for review in this case over the objection of the Attorney General, see Pet. 23-27.

A. Non-Justiciability

TVA argues (Br. in Opp. 7) that the Article III issue is "immaterial" here because the presence of the interveners would keep the case alive even if the dispute between TVA and EPA were held not to present a case or controversy under Article III. As the petition explains (Pet. 28), however, if the dispute between TVA and EPA is nonjusticiable (and EPA thus lacks the ability to enforce the ACO judicially against TVA), then all of the petitions for review should be dismissed, because EPA's order, which is directed solely to TVA, would not be final under *Bennett* v. *Spear*, 520 U.S. 154 (1997). Neither TVA nor the interveners dispute that further Executive Branch review of the order would be required in these circumstances (see Pet. 28 n.13), and the order thus would not satisfy the first *Bennett* prong. 520 U.S. at 177-178 (requiring "consummation" of decisionmaking process).[5] Accordingly, the Court's jurisdiction over this case as a whole depends on whether the intra-governmental dispute between TVA and EPA presents an Article III case or controversy.

In support of the court of appeals' Article III holding, TVA, as had the court of appeals, relies primarily (Br. in Opp. 16-17) on *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).[6] The Court in *Nixon*, however, went to great lengths

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[5] Similarly, pending such a consummation, the possibility of a citizen suit against TVA to enforce EPA's order would not support interveners' standing, see Br. in Opp. 18 n.13, because the non-final order would not support such a suit. In any event, citizens may sue for violations of emissions standards or permit requirements regardless of whether EPA has issued an order. 42 U.S.C. 7604(a)(1) and (3).

[6] TVA asserts (Br. in Opp. 17) that "[t]he [Act] unambiguously authorizes EPA to sue TVA" in authorizing EPA to file suit against "any person"—defined elsewhere to include federal agencies—in court. The cited provision, however, is naturally read to authorize EPA suits only when Article III jurisdiction is otherwise present, regardless of whether the suit is against a federal agency or a private individual. TVA thus errs (*id.* at 18) in claiming that holding this case to be nonjusticiable would "require treating the civil judicial enforcement provisions of [the Clean Air

to emphasize the "unique setting," *id.* at 691, of a criminal prosecution of a sitting President by an independent special prosecutor with unusual independence from the Attorney General. As the Court explained, the special prosecutor enjoyed a tenure tantamount to an independent agency, which the Court described as

> not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the 'consensus' of eight designated leaders of Congress.

Id. at 696. *Nixon* was not an ordinary case, nor did it realistically present the possibility that this case does of a single entity controlling both parties to a justiciable case or controversy.[7] The court of appeals erred in relying on *Nixon* to state a broad and generally applicable rule that intra-agency disputes are justiciable so long as a similar dispute between private parties would have been justiciable, see Pet. App. 73a, and the agencies advocate genuinely conflicting points of view, see *id.* at 74a.

B. TVA's Independent Litigation Authority

Further review is also warranted of the court of appeals' conclusion that TVA had authority to litigate this case independently and over the objection of the Attorney General. Pet. 23-27. TVA fails to identify any statutory source creating an exception to the statutory requirement that "the

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Act] as *un*constitutional." Those provisions are susceptible of a perfectly constitutional construction, regardless of the correct disposition of this case.

[7] Although TVA states (Br. in Opp. 15 n.11) that whether TVA's Board members serve at the pleasure of the President is "an issue never decided by this Court," TVA conspicuously does not argue that its Board members could continue to serve despite a decision by the President to remove them. See *Keim* v. *United States*, 177 U.S. 290, 293 (1900) ("In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.").

conduct of litigation in which the United States, an agency, or officer thereof is a party * * * is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. 516. See also 28 U.S.C. 519.

TVA does refer (Br. in Opp. 8-9) to its history of representing itself in court. Even if TVA's history compelled recognition of some sort of implicit delegation of litigating authority by the Attorney General, however, no such delegation would remain valid when, as here, the Attorney General has positively objected to the litigation. TVA also cites (*id.* at 9 & n.4) the general authority granted to its board of directors, but that general authority is entirely consistent with the overriding authority of the Attorney General to control the "conduct of litigation" of all government agencies —including TVA—in court. 28 U.S.C. 516. In any event, in the face of the express statutory committal of litigating responsibility to the Attorney General, something more than congressional committee reports (Br. in Opp. 10-12 & n.7) or a statute disavowing any effect on whatever litigating authority TVA may have had (*id.* at 9 n.6) is necessary to establish that Congress intended an exception.

This case, in which an important part of an Act of Congress was held unconstitutional in a case brought by a federal agency, is a textbook example of the need for the Attorney General, who represents the overall interests of the federal government, to control government litigation as provided by statute. Further review of the court of appeals' conclusion that TVA has authority to litigate over the objection of the Attorney General is warranted.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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